consideration the element of public interest. This means that the court must impose a deterrent sentence not only to deter the respondent from committing the same offence again but to deter others from committing the same type of crime. The court is aware that in the present case no dangerous weapons were used and the complainant and his friend were not injured. But the court must not overlook the fact that there were five of them who surrounded the complainant and his friend and committed the robbery. If the court does not impose a deterrent sentence the respondent and his four other friends may commit similar offences and they may even use dangerous weapons and inflict injuries on their victims.

I must add that in imposing sentence in this case, the court must also consider society's abhorrence of this type of crime.

The sentence passed by the learned president was manifestly inadequate. The learned president failed to take into consideration the element of public interest. I have taken into consideration that the respondent was a first offender and that he was only twenty years old when he committed the offence. I have also taken into consideration the submission made by his counsel.

Having considered all the circumstances in this case, I order that the sentence of two years passed by the learned president be enhanced to five years' imprisonment from the date of his conviction. I also order that the respondent be punished with six strokes of whipping. The order of the learned president that the respondent pay compensation in the sum of $50 is confirmed.

Appeal allowed.

Reported by *Ng Sheau Jiuan*

Chye Fook & Anor v Teh Teng Seng Realty Sdn Bhd

HIGH COURT (IPOH) – CIVIL SUIT NO 22-38-87
ABDUL MALEK J
27 SEPTEMBER 1988

Contract – Housing development contract – Sale of building lot – Breach of contract – Late completion of building – Notice to rescind contract – Whether plaintiffs can sue for rescission – Time the essence of contract – Housing Developers (Control and Licensing) Act 1966 – Contracts Act 1950, ss 56 & 76

By a consent order following a summons for directions, both parties had asked for the preliminary issue of 'whether the plaintiffs can sue for rescission on the agreement of 8 August 1984 as the house is not completed by 7 August 1986 which is the completion date' be first determined by arguments in open court. The agreement was signed on 8 August 1984 and the completion date was on 7 August 1986 which was 24 months after. The building was not completed on the completion date and the plaintiffs sent a notice to the defendants on 19 January 1987 to rescind the agreement in view of the non-compliance with the 24-month period. The building was finally completed in May 1987 and the certificate of fitness was issued on 9 December 1987. Clause 7 of the agreement provides, inter alia, that 'time shall be the essence of the contract in relation to all the provisions of this agreement'. Clause 18(2) of the agreement stipulates that 'if the vendor fails to deliver vacant possession of the said building in time the vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price'.

Held, allowing the application:

(1) Section 56 of the Contracts Act 1950 states that a contract is voidable at the option of the promisee if the intention of the parties was that time should be the essence of the contract but if it was otherwise the promisee is entitled to compensation from the promisor for any loss occasioned to him by the latter's failure to do the thing at or before the specified time. In this particular instance, the learned judge was of the view that the first limb of the section applied. Therefore, time was the essence of the contract and the contract was voidable. Consequently, since the building was not completed within 24 months from the date of the agreement, the plaintiffs had the option either to continue with the contract or to rescind it.

(2) As provided by s 76 of the Contracts Act 1950, a party who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract. The plaintiffs' entitlement to liquidated damages if the developer failed to complete within 24 months did not in any way take away the rights of the purchaser to rescind the contract.

(3) Having considered the facts, pleadings, affidavits, arguments and authorities, the learned judge gave a positive answer as regards the preliminary issued raised. There was no order as to costs. The learned judge also gave leave to the defendants to appeal.

[*Editorial Note*: Though leave to appeal was granted by Abdul Malek J to the defendants, the latter had later decided not to lodge an appeal.]

Cases referred to

1 *Mayson* v *Clouet & Anor* [1924] AC 980 (refd)
2 *Stickney* v *Keeble & Anor* [1915] AC 386 (refd)
3 *Johnson & Anor* v *Agnew* [1979] 1 All ER 883 (refd)
4 *City Investment Sdn Bhd* v *Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1985] 1 MLJ 285 (FC); [1988] 1 MLJ 69 (PC) (refd)
5 *Beca (Malaysia) Sdn Bhd* v *Tan Choong Kuang & Anor* [1986] 1 MLJ 390 (refd)
6 *Sim Chio Huat* v *Wong Ted Fui* [1983] 1 MLJ 151 (refd)
7 *Tan Hock Chan* v *Kho Teck Seng* [1980] 1 MLJ 308 (refd)
8 *Yeow Kim Pong Realty Ltd* v *Ng Kim Pong* [1962] MLJ 118 (refd)
9 *Photo Production Ltd* v *Securicor Transport Ltd* [1980] AC 827 (refd)

Legislation referred to

Contracts Act 1950 ss 56, 76
Housing Developers (Control and Licensing) Act 1966
Housing Developers (Control and Licensing) Enactment 1978
Housing Developers (Control and Licensing) Rules 1970
Housing Regulations PU(A) 122/82

NT Lalchand for the plaintiffs.
SN Leow for the defendants.

Cur Adv Vult

Abdul Malek J: By a consent order dated 22 February 1988 (encl 17) following a summons for directions (encl 13) filed on 2 January 1988, both parties had asked for the preliminary issue of 'whether the plaintiffs can sue for rescission on the agreement of 8 August 1984 as the house is not completed by 7 August 1986 which is the completion date' be first determined by arguments in open court on a date to be fixed by the senior assistant registrar.

It is necessary to refer to cl 7 of the relevant agreement (bundle A of encl 4) which provides that '*time shall be the essence of the contract in relation to all the provisions of this agreement* and in particular to the payment of any instalment of the purchase price or any part thereof and the payment of all moneys due from the purchaser to the vendor under this agreement' (emphasis mine) and to cl 18(1) of the said agreement which states that 'the said building shall be completed by the vendor and vacant possession delivered to the purchaser within twenty-four (24) calendar months from the date of this agreement'.

However, cl 18(2) of that agreement stipulates that 'if the vendor fails to deliver vacant possession of the said building in time the vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price'. It is this particular provision of the agreement that had resulted in this particular preliminary issue having to be determined.

Learned counsel for the defendants had argued that the presence of cl 18(2) demolishes the right of the plaintiffs to sue for rescission while learned counsel for the plaintiffs had submitted that time has been stated to be the essence of all the provisions of the contract and a breach of it entitles the purchaser to rescind. The defendants in their affidavit at encl 7 had admitted that the building was not completed within 24 months and the plaintiffs accept the fact that the completion was in May 1987 and that the certificate of fitness was issued on 9 December 1987 but nevertheless had given notice to the defendants to rescind the agreement on 19 January 1987 which was before the completion of the building.

Learned counsel for the defendants had further submitted that this was not a case where the defendants had abandoned the project or had failed to do the work. He also argued that the agreement was in line with housing regulations as provided in PU(A) 122/82 and that both parties had to adopt the agreement. In the circumstances, he stated that there was no provision in the agreement giving the purchaser the option to terminate especially with the inclusion of cl 18(2) considering the fact that the plaintiffs had given the notice to terminate while the defendants were still performing the contract.

It is relevant at this stage to recapitulate the facts. The agreement had been signed on 8 August 1984 and the completion date was therefore on 7 August 1986 which was exactly 24 months after. The building was not completed on the completion date and the plaintiffs sent a notice to the defendants on 19 January 1987 to rescind the agreement in view of the non-compliance with the two-year period. The building was finally completed in May 1987 and the certificate of fitness issued on 9 December 1987.

Now, it is pertinent to examine the law on this point. In *Mayson* v *Clouet & Anor*[1] Lord Dunedin had said 'the law is quite plain. If one party to a contract commits a breach then if that breach is something that goes to the root of the contract, the other party has his option. He may still treat the contract as existing and sue for specific performance; or he may elect to hold the contract as at an end, that is, no longer binding on him – while retaining the right to sue for damages in respect of the breach committed.'

Some nine years earlier in *Stickney* v *Keeble & Anor*,[2] Lord Parker of Waddington had pragmatically pronounced the principles as follows:

> My Lords, in a contract for the sale and purchase of real estate, the time fixed by the parties for completion has at law always been regarded as essential. In other words, courts of law have always held the parties to their bargain in this respect, with the result that if the vendor is unable to make a title by the day fixed for completion, the purchaser can treat the contract as at an end and recover his deposit with interest and the costs of investigating the title.
>
> In such cases, however, equity having a concurrent jurisdiction did not look upon the stipulation as to time in precisely the same light. Where it could do so without injustice to the contracting parties it decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion, and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure.
>
> This is really all that is meant by and involved in the maxim that in equity the time fixed for completion is not of the essence of the contract, but this maxim never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when, for example, the parties, for reasons best known to themselves, had stipulated that the time fixed should be essential, or where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract.
>
> It should be observed, too, that it was only for the purposes of granting specific performance that equity in this class of cases interfered with the remedy at law. A vendor who had put it out of his own power to complete the contract, or had by his conduct lost the right to specific performance, had no equity to restrain proceedings at law based on the non-observance of the stipulation as to time.

The House of Lords in *Johnson & Anor* v *Agnew*[3] had declared '... it is possible to state at least some uncontroversial propositions of law. First, in a contract for the sale of land, after time has been made, or has become, of the essence of the contract, if the purchaser fails to complete, the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract; or he may seek from the court an order for specific performance with damages for any loss arising from delay in peformance. Similar remedies are of course available to purchasers against vendors. This is simply the ordinary law of contract applied to contracts capable of specific performance.'

More recently, and more within our shores, there had also been several decisions relating to breach of contract in the sale of immovable property, albeit not exactly on the same facts. In *City Investment Sdn Bhd* v *Koperasi Serbaguna Cuepacs Tanggungan Bhd*[4] which went up to the Privy Council, Lord Templeman had candidly observed that '... the Act of 1966 (the Housing Developers (Control and Licensing) Act 1966) and the Rules (the Housing Developers (Control and Licensing) Rules 1970) were designed to improve and supplement common law remedies and do not expressly or by implication deprive a litigant of a contractual remedy which is not dealt with under the Rules.'

In *Beca (Malaysia) Sdn Bhd* v *Tan Choong Kuang & Anor*[5] the respondents had agreed to buy three units of flats from the appellants, who were housing developers, and paid a deposit of $20,000 before the issuance of the developer's licence to the appellants. The respondents subsequently refused to sign the sale and purchase agreement and claimed a refund of the deposit. The then Federal Court held that the agreement was valid but was voidable at the instance of the buyers. Lee Hun Hoe CJ (Borneo) stated '... We also agree that the subsequent granting of the licence and the permit by the Controller could in no way rectify the provisional agreement without the consent or knowledge of the buyers ... Since the Enactment (the Housing (Control and Licensing of Developers) Enactment 1978) is meant to be for the benefit of the house buyers it would seem, in our view, proper and right to regard the provisional agreement as binding but voidable at the instance of the house buyers. They should be given the option of either enforcing or repudiating the agreement depending upon the market situation of the housing development in the country.'

In *Sim Chio Huat* v *Wong Ted Fut*[6] it was held by the Federal Court that as time was provided to be of the essence of the agreement, the stipulated periods within which the houses had to be delivered to the respondent became an essential condition of the agreement and that the failure by the appellant to fulfil this condition entitled the respondent to have an option of treating the agreement either as having been repudiated or as still continuing. Again, in *Tan Hock Chan* v *Kho Teck Seng*[7] the Federal Court had held that 'where a party is in breach of his covenant, particularly a covenant so essential to the performance of the contract ... the other party to the contract may rescind the contract and he does so, ordinarily, by giving notice of his intention to do so. His right to do so arises immediately where time is or is made the essence and the time has passed.' The Privy Council in another Malaysian case decided some 18 years earlier, namely, *Yeow Kim Pong Realty Ltd* v *Ng Kim Pong*,[8] had decided that since the supplementary agreement for the purchase of land was binding on the parties and time was the essence of the agreement there had been a breach by the respondent and the appellant was entitled to rescind the contract on the appointed date.

Learned counsel for the defendants argued that the agreement followed the format prescribed in Schedule E of the Housing Developers (Control and Licensing) Act 1966 and that there was no provision in it providing for the purchaser to terminate. He contended that since cl 18 had two limbs, cl 7 could not apply to the second limb of cl 18 which provided for liquidated damages for non-completion within the prescribed agreed period. To my mind, this argument is devoid of logic and merit as, on a proper analysis of the two provisions, it does not result in one actually contradicting the other. The issue only actually boils down to the fact as to whether the purchaser, despite being entitled to liquidated damages for delayed completion by virtue of the agreement, is also entitled to opt to rescind the said contract. Learned counsel for the defendants had also submitted that most of the authorities cited referred to the repealed 1970 Rules for the same purpose but to the court this made no difference to the situation as even the 1970 Rules did not specifically provide for rescission.

Section 56 of the Contracts Act 1950 states that a contract is voidable at the option of the promisee if the intention of the parties was that time should be the essence of the contract but if it was otherwise the promisee is entitled to compensation from the promisor for any loss occasioned to him by the latter's failure to do the thing at or before the specified time. In this particular instance, I was of the view that the first limb of the section applied. Therefore, time was the essence of the contract and the contract was voidable. Consequently, since the building was not completed within 24 months from the date of the agreement, the purchaser plaintiff had the option either to continue with the contract or to rescind it.

Since it is a question of construction depending on the facts of each case as to whether there has been a

substantial failure of performance or a breach of an essential term, perhaps what Lord Diplock said in *Photo Production Ltd* v *Securicor Transport Ltd*[9] may throw some light on the matter. He had said that 'where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract, the party not in default may elect to put an end to all primary obligations of both parties remaining unperformed.'

Chitty on Contracts, Vol 1, 24th Ed, states at paras 1270-71 that at common law, in the absence of a contrary intention, performance of the contract had to be carried out upon the exact date specified in the contract and a party could treat the contract as at an end if the other party's performance was not completed on a fixed date, since time was of the essence of the contract. However, in equity time was not of the essence of the contract except in three situations, namely, where the parties had expressly stipulated in their contract that the time fixed for performance must be exactly complied with, where the circumstances of the contract or the nature of the subject matter indicates that a fixed date must be exactly complied with and where time was not originally of the essence of the contract but one party had been guilty of undue delay and the other party had given notice requiring the contract to be performed within a reasonable time. It is clear therefore at both common law and equity that the plaintiff had the right to rescind the contract where time is of the essence in the contract.

At this stage of the proceedings, this court was not asked to determine whether the rescission would result in the plaintiffs not being able to receive the liquidated damages but in passing I would say that, as provided by s 76 of the Contracts Act 1950, a party who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract. I had in fact made it clear in my ruling that the plaintiffs' entitlement to liquidated damages if the developer failed to complete within 24 months did not in any way take away the rights of the purchaser to rescind the contract.

There was no evidence as to what stage of building progress the building was at at the completion date but from the photographs taken in July 1987, only the plaintiffs' house had been built out of a row of terrace houses and also no other houses could be seen in the area. Since, from the photographs, the plaintiffs' house appears to be the only house built in the area, it is possible that the construction could have even begun after the completion date. That, however, is of secondary importance.

What is relevant here is that the plaintiffs had entered into a sale and purchase agreement with the defendants to buy the house and had expected to move into the house two years later. They certainly would have made the necessary preparations for this event and any change in plans would have caused them a great deal of inconvenience and expense. Therefore, if the house was not completed on the appointed date and in fact had not been completed even five months thereafter when the notice to terminate was sent to the defendants and was only completed nine months later and the certificate of fitness issued 16 months after the appointed date, the court is of the view that it is within the right of the purchaser plaintiffs to rescind the contract with the defendants based on legal principles and case law.

Consequently, on these facts and having considered the pleadings, affidavits, arguments and authorities, I would answer in the positive as regards the preliminary issue raised. There will be no order as to costs. On their application and in view of the legal questions involved, I also gave leave to the defendants to appeal.

Application allowed.

Solicitors: *Lalchand, Nawawi, Phang & Co; SN Leow & Co.*

Reported by *Wong Kim Fatt*

Dollah bin Haji Salleh v Tuan Hj Muhyiddin bin Hj Mohd Yassin & Anor

HIGH COURT (JOHORE BAHRU) – ORIGINATING SUMMONS NO 31-706 OF 1988
ZAKARIA YATIM J
25 SEPTEMBER 1988

Administrative Law – Order of declaration – Application for – Ban imposed by Johor Football Association ('JFA') on plaintiff from playing football at all levels in Malaysia – Whether ban was ultra vires JFA constitution – Whether plaintiff should have made further appeal to Football Association of Malaysia so as to exhaust all domestic remedies available to him

Civil Procedure – Estoppel – Ban imposed by Johor Football Association on plaintiff from playing football at all levels in Malaysia – Plaintiff commenced legal proceedings against JFA but these were later withdrawn – Whether plaintiff estopped from subsequently seeking declaratory order that ban was ultra vires – Whether plaintiff has exhausted all his remedies in JFA before commencement of proceedings

The plaintiff was a football player for the Johor Football Association ('JFA') from 1982-87. Sometime in 1988 he resigned from JFA. By a letter dated 19 July 1988, the JFA banned the plaintiff from playing football at all levels in Malaysia for a period of three years. The letter told the plaintiff that the disciplinary committee of JFA had found him guilty of misconduct. The plaintiff appealed to the appeal committee of